



EMPLOYMENT TRIBUNALS

Claimant: Mr Rafal Rawski
Respondent: A & H Structures Ltd
Heard at: Nottingham
On: Monday 15 and Tuesday 16 July 2019
Before: Employment Judge Victoria Butler (sitting alone)

Representation

Claimant: Mr S Donovan, Resolutions Mansfield
Mrs Magdalena Johnson (interpreter)
Respondent: Ms S Fergusson, Director

RESERVED JUDGMENT

The Employment Judge gives judgment as follows:

1. The complaint of unfair dismissal (sections 94 and 98 of the Employment Rights Act 1996) is rejected and dismissed.
2. The claim of wrongful dismissal is not well-founded and is dismissed.
3. The complaints of unauthorised deductions from wages, in respect of both accrued but untaken holiday pay and ten hours' unpaid wages, are not well-founded and are dismissed.

REASONS

1. **Background to this claim**

- 1.1 The Claimant presented his claim to the tribunal on 30 July 2018. In the Claim Form, he says that he was employed by the Respondent from 23 May 2011 until 16 April 2018 as a welder. He claimed:-
- that he resigned from the Respondent on 16 April 2018 but was subsequently dismissed by Mr Michael Allen who is the Respondent's Company Secretary and the Claimant's line manager;
 - wrongful dismissal;
 - holiday pay; and
 - ten hours' unpaid wages.
- 1.2 The Claimant confirmed at a previous preliminary hearing that he was not pursuing a claim of constructive unfair dismissal and this was also confirmed at the hearing before me.
- 1.3 The Claimant's case is that he secured alternative employment with Robinsons Structures as a welder. The new position was better remunerated, closer to home and enabled the Claimant to work nights, allowing him to undertake childcare during the day.
- 1.4 On Friday 13 April 2018, Mr Allen asked him if he was planning to leave the Respondent. The Claimant told Mr Allen that he was but that he would provide two weeks' written notice the following Monday. The Claimant alleges that Mr Allen shouted at him and told him to leave the Respondent saying, 'leave my company, I don't have any jobs for you'. The Claimant advised Mr Allen that he would return on Monday with a translator, which he duly did.
- 1.5 When the Claimant arrived at the Respondent's premises on Monday 16 April 2018, he entered Mr Allen's office and claims that Mr Allen became angry and shouted at him, telling him to leave the office. A sub-contractor, Mr Barnsley, who was also in the office approached the Claimant at speed and took hold of the Claimant's head whist shouting at him to leave the office too. The Claimant was fearful for his safety and left the office to wait outside.
- 1.6 Mr Allen invited the Claimant into his office some 10/15 minutes later. The Claimant told him that he would start his new job on 30 April 2018 and that he was giving two weeks' notice. However, Mr Allen said he did not have a job for the Claimant and had already replaced him. The Claimant confirmed that he wanted to work his notice period but Mr Allen said there was 'no job for him'

and if he and a new job then he should 'go to it'. It is on that basis that the Claimant claims he was dismissed.

- 1.7 After this meeting, the Claimant went to the Citizens' Advice Bureau after which he started to feel unwell. He went to the hospital where it was confirmed that he was suffering from high blood pressure.
- 1.8 The Claimant's claim for holiday pay is for 1 day's pay which he says would have accrued had he been able to work his notice period. He confirmed that there was no outstanding holiday pay up to and including the termination date.
- 1.9 The Claimant claims wrongful dismissal claim in respect of 2 weeks' notice pay. It was acknowledged by all parties that the Claimant had not suffered any losses for this period because he commenced better paid employment on 16 April 2018.
- 1.10 The final outstanding dispute was in relation to 10 hours unpaid work.

2. The issues

- 2.1 The Claimant contends that his dismissal was unfair for the purposes of sections 94 and 98 of the Employment Rights Act 1996 (ERA). The tribunal needed to consider the following:
 - 2.1.1 When did the Claimant resign?
 - 2.1.2 What is the effective date of termination, was it either 13 April 2018 or 16 April 2018?
 - 2.1.3 Did the Claimant give notice? It is to be noted that under his contract of employment, the Claimant was obliged to give one week's notice but he claims that he gave two. If the Respondent terminated his employment, it was obliged to give six weeks' notice.
 - 2.1.4 If the Respondent dismissed the Claimant, what was the reason and was that a potentially fair reason for dismissal?
 - 2.1.5 If there was a potentially fair reason for dismissal, was the dismissal fair in all the circumstances?
 - 2.1.6 Did the Respondent fail to pay the Claimant ten hours' basic pay amounting to £115 for hours worked on 1 January 2018, 30 March 2018 and 2 April 2018?
 - 2.1.7 Is the Claimant entitled to payment for accrued holiday entitlement during what would have been the Claimant's notice period?

3. The evidence

- 3.1 The Claimant provided a witness statements for himself, Ms Monika Pekron, Recruitment Consultant, and Dominik Buraczewski who was the Claimant's interpreter on 16 April 2018.
- 3.2 I heard oral evidence from the Claimant however, Ms Pekron and Mr Buraczewski were not in attendance. Ms Pekron was unable to attend the hearing as she was 8 months' pregnant and did not feel able to make the journey. The parties agreed that it would be helpful if she gave evidence over the phone and the Respondent's representative was able to cross-examine Ms Pekron.
- 3.3 Mr Donovan could not offer an explanation as to why Mr Buraczewski was not in attendance and I confirmed that, as a result, less, if any weight at all, would be given to his statement.
- 3.4 For the Respondent, the tribunal heard oral evidence from Mr Allen, Company Secretary. When Mr Allen was sworn in, he advised that he struggled with his hearing although he could hear me. When cross-examining, Mr Donovan re-positioned to the chair closest to the witness stand and Mr Allen confirmed that he could hear satisfactorily.
- 3.5 Mr Allen also advised that he was mildly dyslexic. I offered to read out the paragraphs of his witness statement that he was being taken to by Mr Donovan. Mr Donovan helpfully did the same. Mr Allen subsequently confirmed that it was only longer words that he struggled with and he would tell me if he needed any further assistance.
- 3.6 It was unfortunate that I did not have a single, agreed bundle of documents before me. The Respondent produced a bundle of documents, which I shall refer to as bundle "R1". The Claimant produced a small bundle of documents at the hearing, which I shall refer to as bundle "C1" and confirmed that he wished to rely on a previous bundle of documents used at the preliminary hearing on 15 May 2019 - which I shall refer to as "C2". Mr Donovan had not produced further copies for use at this hearing, but I was able to locate the copy used previously by the Tribunal. Mr Donovan helpfully provided an additional copy on the second day of the hearing.
- 3.7 All witnesses who gave evidence were asked questions by way of cross-examination and re-examination in the cases of the Claimant and Mr Allen.
- 3.8 I found all the witnesses to be credible but, on balance, I preferred the evidence of Mr Allen which was consistent and supported by the documents.

4. **The facts**

- 4.1 The Respondent is a specialist supplier of steel-framed buildings based in Ashbourne, Derbyshire employing circa 20 people. The Claimant commenced employment on 23 May 2011 and worked under contracts of employment dated 24 May 2011 and 8 July 2015 (pages 53–59 and 60–65 in bundle C2). He was

employed as a welder and there were no significant issues with his performance and/or conduct that resulted in any disciplinary action being taken against him.

- 4.2 The Claimant's contract of employment provides that the written notice required by the Claimant on leaving was one week and the notice required to be given by the Respondent was in accordance with the statutory provisions in s.86 Employment Rights Act 1996 – so at the point of leaving it would have been obliged to give six weeks' notice.
- 4.3 Mr Allen is the Respondent's Company Secretary and is instrumental in its day to running as well as managing its employees. In June 2018, Mr Allen accepted a voluntary disqualification undertaking following a health and safety investigation into another business undertaking. The facts surrounding this have no bearing on the case before me.
- 4.4 On 11 April 2018, the Claimant secured alternative employment with Robinsons Structures which was better paid, closer to home and on nights. The recruitment agency confirmed an agreed start date of 30 April 2018 (pages 45 – 52 C2).
- 4.5 Mr Allen had heard rumours in the workplace that the Claimant was intending to leave the Respondent's employ. On Friday 13 April 2018, he went into the factory at approximately 5.10pm and found the Claimant working alone doing overtime. Whether or not that overtime was authorised is not relevant to the issues I must decide. Mr Allen asked the Claimant to finish work and clock-off. Whilst they were walking from the factory to the car park Mr Allen asked the Claimant if he was leaving the Respondent. The Claimant confirmed that he was and his last day would be 27 April 2018. His new job started on 30 April 2018, but he could start sooner if Mr Allen agreed to let him go early. Since the new role was much more favourable to the Claimant, Mr Allen agreed to release the Claimant earlier, but asked him to confirm his resignation in writing for the Respondent's records. The Claimant agreed that he would do this on the following Monday, 16 April 2018.
- 4.6 On 16 April 2018, the Claimant arrived at the Respondent's premises with an interpreter. He had no intention of working that day evidenced by the fact that did not clock in. When he entered the office, Mr Allen was having a private and confidential meeting with a sub-contractor, Mr Barnsley. The Claimant was asked to leave by Mr Allen and when he did not, Mr Barnsley shouted at him to get out of the office and wait until he was called in.
- 4.7 I do not accept that there was any physical contact at all between the Claimant and Mr Barnsley. Once Mr Allen concluded his meeting, he invited the Claimant into the office and he handed over his resignation letter – page 1 R1. Mr Allen understood the Claimant's reasons for leaving and bore no animosity towards him. He genuinely thought he was doing the Claimant a favour by releasing him from his notice period so that he could start a better remunerated and convenient job as soon as possible.
- 4.8 The Claimant's P45 was prepared on 16 April 2018 – page 41 C2.

4.9 The Claimant commenced his new employment with Robinsons on 16 April 2018.

4.12 I find that the Respondent maintains accurate records of its employees' working hours by way of a clocking in and out system and pays its employees according to those records. This was clearly evidenced at pages 18 – 25 in R1.

5. The Law

Unfair dismissal

5.1 The claim of unfair dismissal is made under Section 94 of the Employment Rights Act 1996 ("ERA"). Section 98 of the ERA details the circumstances in which an employee is dismissed. It provides:

1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "*capability*", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "*qualifications*", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

Wrongful dismissal

5.2 The Employment Tribunals Extension of Jurisdiction Order 1994 provides that proceedings for breach of contract may be brought before a Tribunal in respect of a claim for damages or any other sum (other than a claim for personal injuries and other excluded claims) where the claim arises or is outstanding on the termination of the employee's employment.

5.3 A claim for notice pay is a claim for breach of contract; *Delaney v Staples* 1992 ICR 483. The Employment Tribunals Extension of Jurisdiction Order 1994 provides that proceedings for breach of contract may be brought before a Tribunal in respect of a claim for damages or any other sum (other than a claim for personal injuries and other excluded claims) where the claim arises or is outstanding on the termination of the employee's employment.

Holiday pay

5.4 Regulations 13, 13A and 16 of the Working Time Regulations read together provide that a worker is entitled to 5.6 weeks (up to a maximum of 28 days) paid leave in any leave year. A worker's contract may provide an entitlement in excess of this statutory minimum. Regulation 14 provides that a worker is entitled to be compensated for accrued but untaken leave upon termination of his employment.

Unauthorised deductions from wages

5.5 Section 13 of the Employment Rights Act 1996 provides that an employer must not make a deduction from a worker's wages employed by him unless the deduction is required by statute, under a relevant provision in a worker's contract, or the worker has previously signified their written agreement or consent to the making of the deduction. A deficiency in the payment of wages properly payable is a deduction for the purposes of this section.

6. Conclusions

6.1 I am satisfied that the Claimant resigned of his own volition following the confirmation that he was successful in securing a new role at Robinsons. The Claimant resigned with effect from 16 April 2018 following agreement with Mr Allen, and both parties understood that this would be the effective date of termination.

- 6.2 I am further satisfied that Mr Allen bore no animosity towards the Claimant and, that when the Claimant said he could start earlier if Mr Allen released him, Mr Allen agreed to do so. He asked the Claimant to confirm his resignation in writing. The Claimant said he would do that on Monday 16 April 2018, and this is the effective date of termination.
- 6.3 I am satisfied that following the conversation between Mr Allen and the Claimant on Friday evening, the Claimant understood that he was resigning on 16 April 2018, hence why he brought in his letter of resignation that day. I do not accept that Mr Allen dismissed the Claimant on Friday 13 April or that the Claimant understood that he had been dismissed. The Claimant's intent to resign on the 16th is supported by the fact that he did not clock in that morning and was not dressed for work which is consistent with the Claimant's understanding that he was resigning on the 16th and starting work with Robinsons at some point later that day.
- 6.4 I do not find that the Claimant was dismissed. As such, I do not need to consider the fairness or otherwise of any dismissal under section 98 Employment Rights Act 1996.
- 6.5 Further, the Claimant's claim of wrongful dismissal fails. The Claimant resigned and the parties agreed that he would leave on 16 April 2018 so that he could start his better remunerated role as soon as possible. Whilst the Claimant's letter of resignation says that he 'will continue to work for the company for the next two weeks, completing [his] employment on 27/4/2018' I am satisfied that he had no intention of working until 27 April 2018 after his conversation with Mr Allen on the 13th. As such, there has been no breach of contract and no damages are due to the Claimant. I find that the Claimant held a mistaken belief that if he 'offered' to work two weeks' notice in writing he was entitled to payment for it, regardless of whether he worked it. This is, of course, incorrect.
- 6.6 The Claimant's claim for accrued holiday pay fails. The effective date of termination was 16 April 2018 and he agrees that he is not due any further holiday pay up to and including this date. The Claimant was entitled to 28 days' holiday (including bank holidays) which is the minimum allowed under the Working Time Regulations 1998. Holiday entitlement does not accrue after the effective date of termination, nor is there any right to accrue holiday during a notional notice period. In any event, I find that the parties agreed that the effective date of termination would be 16 April so the Claimant's argument that he should accrue holiday during this period does not arise in any event.
- 6.7 The Claimant has not presented any evidence to prove that he worked, but was not paid for, the hours undertaken on 16 January, 30 March and 2 April 2019. I find that the Respondent maintains accurate records of its employees' working hours by way of a clocking in and out system and pays its employees according to those records. The Claimant has not attempted to persuade the Tribunal that these records are inaccurate, nor has he provided any evidence to contrary. Accordingly, his claim must fail.
- 6.8 For these reasons, the claims fail and are dismissed.

Employment Judge Victoria Butler

Date: 02 August 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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